

IN THE SUPREME COURT OF THE UNITED STATES

Pages: 1 through 58  
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1           IN THE SUPREME COURT OF THE UNITED STATES

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4       CURTIS GIOVANNI FLOWERS,                                 )

5                                 Petitioner,                                 )

6                                 v.   ) No. 17-9572

7       MISSISSIPPI,   )

8                                 Respondent.                                 )

9       - - - - -

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11                                 Washington, D.C.

12                                 Wednesday, March 20, 2019

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14                                 The above-entitled matter came on for  
15       oral argument before the Supreme Court of the  
16       United States at 10:16 a.m.

17

18       APPEARANCES:

19       SHERI LYNN JOHNSON, ESQ., Ithaca, New York; on behalf  
20                 of the Petitioner.

21       JASON DAVIS, Special Assistant Attorney General,  
22                 Jackson, Mississippi; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 17-9572, Flowers  
5 versus Mississippi.

6 Ms. Johnson.

7 ORAL ARGUMENT OF SHERI LYNN JOHNSON

8 ON BEHALF OF THE PETITIONER

9 MS. JOHNSON: Mr. Chief Justice, and  
10 may it please the Court:

11 The only plausible interpretation of  
12 all of the evidence viewed cumulatively is that  
13 Doug Evans began jury selection in Flowers VI  
14 with an unconstitutional end in mind, to seat  
15 as few African American jurors as he could.

16 The numbers alone are striking. In  
17 the first four trials, Mr. Evans exercised 36  
18 peremptory challenges, all of them against  
19 African American jurors. In the sixth trial,  
20 he exercised five out of six of his challenges  
21 against African American jurors.

22 If we look at the numbers of his --  
23 regarding his questioning, they are likewise  
24 stark. He asked of the struck African American  
25 jurors an average of 29 questions. He asked of

1 the seated white jurors an average of 1.1  
2 questions.

3 But these numbers do not stand alone.  
4 Mr. Evans was twice found to have discriminated  
5 on the basis of race in the exercise of his  
6 peremptory challenges against African American  
7 defendants in trials of the same case against  
8 the same defendant.

9 There is no one who has a record of  
10 discrimination, adjudicated discrimination,  
11 like that of Mr. Evans.

12 JUSTICE ALITO: The history of the  
13 case prior to this trial is very troubling, and  
14 you've summarized that. And it is -- it is  
15 cause for concern and is certainly relevant to  
16 the decision that ultimately has to be made in  
17 the case. But if we were -- and I'm not  
18 suggesting that this is the way it should be  
19 analyzed; this is not the way it should be  
20 analyzed -- but if we were to disregard  
21 everything that happened before this trial, and  
22 we looked at the strikes of the black  
23 prospective jurors as we would in any other  
24 Batson case, do you think you'd have much  
25 chance of winning?

1           MS. JOHNSON: The evidence still is  
2 clear and convincing that Mr. Evans acted with  
3 discriminatory motivation in this case, even if  
4 we set aside his history and his -- the reasons  
5 that he was unwilling to tell the truth in  
6 previous cases.

7           JUSTICE ALITO: I mean, if look at --  
8 at the jurors in question one by one, there are  
9 aspects that I think would cause any prosecutor  
10 anywhere to want to get that jury -- that juror  
11 off the jury. There's a juror who said that  
12 she -- she couldn't view the evidence  
13 objectively. She couldn't make a decision  
14 based just on the evidence.

15           There's one who said that she --  
16 because of her acquaintance with members of the  
17 Flowers family, she would lean toward the  
18 defendant. Another one who admitted that she  
19 made a false statement on her juror  
20 questionnaire because she'd say anything to get  
21 off the jury.

22           I mean, do you think those are --  
23 those are Batson claims that would likely  
24 succeed if this troubling history had not  
25 preceded this case?

1           MS. JOHNSON: This Court has demanded  
2   a sensitive inquiry into all of the  
3   circumstances that prove racial discrimination.  
4   And, again, even setting aside his history,  
5   there are many circumstances here that suggest  
6   racial -- racial motivation.

7           First, as I already said, there is an  
8   extraordinary record of disparate questioning.  
9   And the disparate questioning is not limited to  
10  those numbers but to the tone of his  
11  questioning. I believe that one of the -- the  
12  responses that you quoted came from an  
13  extremely aggressive pursuit of an African  
14  American juror who initially said she would not  
15  be troubled and ultimately said it's possible.

16           Now, of course, a prosecutor could  
17  take that approach with every juror. If he  
18  took that aggressive approach with every juror,  
19  then there would be nothing to complain about.  
20  But he did not take that approach with white  
21  jurors.

22           And then there is his out-of-court  
23  investigation of three African American jurors.  
24  And then there are --

25           JUSTICE ALITO: But what -- what's

1 wrong with that? Again, putting aside the  
2 reasons to be suspicious, if a juror says, I  
3 don't -- I didn't work -- I don't work closely  
4 with the defendant's sister, I don't work close  
5 to the defendant's sister, and the prosecutor  
6 has reason to suspect that's not true, is there  
7 something wrong with the prosecutor going to  
8 the human relations person at that place of  
9 employment and bringing that person in to  
10 testify they actually work nine to ten inches  
11 apart? Is something wrong with that?

12 MS. JOHNSON: There's nothing wrong  
13 with that if there was reason to disbelieve the  
14 juror. The juror volunteered that she knew  
15 her, that she worked in that place. There --  
16 Mr. Evans cited no reason that he should not  
17 believe her.

18 But, also, what happens after that is  
19 somewhat suspicious, which is he brings someone  
20 in to say: Well, they worked very close  
21 together. And that someone says: And I could  
22 produce the evidence. And when asked to  
23 produce the evidence of that, the records that  
24 produce it, he doesn't come back with that  
25 evidence.



1                   So I think we could certainly -- a  
2     prosecutor could --

3                   JUSTICE SOTOMAYOR:   Wait.

4                   MS. JOHNSON:   -- and a rich prosecutor  
5     might investigate all --

6                   JUSTICE ALITO:   What is your strongest  
7     --

8                   JUSTICE SOTOMAYOR:   Did he -- did he  
9     have that witness ready that same day, or did  
10    --

11                  MS. JOHNSON:   No, he brought the  
12    witness back the next day.

13                  JUSTICE SOTOMAYOR:   The next day,  
14    okay.

15                  JUSTICE ALITO:   What is your strongest  
16    strike?

17                  MS. JOHNSON:   I -- I think the most --  
18    the clearest case is that of Carolyn Wright.  
19    Carolyn Wright -- about Carolyn Wright, he made  
20    three false statements.   The first statement he  
21    made was that her wages were garnished.   That  
22    was not --

23                  JUSTICE ALITO:   Well, actually, we  
24    have found that, in the record with a state  
25    exhibit on it, a judgment that shows that her

1 wages were garnished.

2 MS. JOHNSON: No, the wages -- there's  
3 a mark that shows that there was such a  
4 request, but both the trial court and the  
5 Mississippi Supreme Court looked at that record  
6 and found that her wages had not been  
7 garnished. And then --

8 JUSTICE ALITO: Well, we can look at  
9 that. We can look at the judgment. But the  
10 fact remains that she was -- this was -- one of  
11 the victims was the proprietor of -- of a  
12 family-owned store, right? That's a  
13 family-owned store?

14 MS. JOHNSON: Correct.

15 JUSTICE ALITO: And the store -- the  
16 store sued her?

17 MS. JOHNSON: Well, the store sued  
18 her. The victim herself had not sued her.

19 JUSTICE ALITO: Well, but the store  
20 did.

21 MS. JOHNSON: It's the son-in-law  
22 later that sued her.

23 JUSTICE ALITO: But, normally,  
24 wouldn't that -- you know, again, put aside the  
25 history. We -- but we can't -- in the end, we

1     can't do it, but if you did, don't you think a  
2     prosecutor or any attorney would be very wary  
3     of having a -- a juror who had been sued by one  
4     of the parties?

5             MS. JOHNSON: I think that if this  
6     prosecutor had pursued bias with respect to  
7     white jurors as well as African American  
8     jurors, and then made that strike, then that  
9     would be a strike that would be a permissible  
10    strike. But, in fact, he didn't do that.

11            So, first of all, I do want to notice  
12    that this was one of four victims. It does  
13    seem rather unlikely that a person in a  
14    quadruple homicide case would be biased by a  
15    subsequent suit of one of the relatives. But,  
16    even if we thought that that were true, one  
17    would have imagined that the prosecutor would  
18    have inquired about bias with respect to the  
19    other victims.

20            JUSTICE GINSBURG: Wasn't there a  
21    question asked of the entire array of whether  
22    they had any debts to the -- to the store?

23            MS. JOHNSON: Yes, but there was no  
24    question asked about suits or disputes with  
25    other -- with the other three victims, nor was

1     there an inquiry into bias that I think any  
2     rational prosecutor would have made if  
3     concerned, truly, about bias, which was  
4     lawsuits, prosecutions of the jurors and their  
5     close relatives by his office.

6             The prosecutor made no inquiry about  
7     that. If you were worried about bias, you  
8     would be worried about that. If you were --

9             JUSTICE SOTOMAYOR: Did he even ask  
10    Ms. Wright how she felt about that suit and  
11    whether it would affect her in this case?

12            MS. JOHNSON: In fact, she was asked  
13    about the suit. And when she was asked about  
14    that suit, what she said is that she had paid  
15    the debt and that she had no ill will toward  
16    the parties.

17            And, indeed, if we follow up on this  
18    reason, I think this reason is especially  
19    suspicious because he cited the same reason  
20    with respect to Edith Burnside.

21            So, first of all, he said it with  
22    respect to Edith Burnside. He repeated the  
23    false statement that her wages had been  
24    garnished, despite the fact of having been  
25    called by the trial court on it the first time,

1 and then he said that he was striking her in  
2 part on that basis.

3 But Ms. Burnside had --

4 JUSTICE SOTOMAYOR: Can you go back,  
5 and -- and just slow down a second? You said  
6 to Justice Alito that that record in -- that  
7 state record that says something about  
8 garnishment, that the state courts found that  
9 that was not adequate.

10 Could you explain why not?

11 MS. JOHNSON: Well --

12 JUSTICE SOTOMAYOR: That judgment in  
13 the record, what is it or --

14 MS. JOHNSON: The judgment --

15 JUSTICE SOTOMAYOR: That -- it's not a  
16 -- it's a form in the record, but what does it  
17 mean?

18 MS. JOHNSON: The form in the record  
19 reflects a suit, and there's a little check by  
20 garnishment. But, if you look at the order at  
21 the end, there is no garnishment order.

22 The trial court looked at that and the  
23 Mississippi Supreme Court looked at that. And  
24 I think they are the experts about what their  
25 documents mean. And they said there was no

1 garnishment.

2 JUSTICE GORSUCH: What if -- what if  
3 it turned out there were a garnishment? How  
4 would that affect your argument, if at all?

5 MS. JOHNSON: Well -- well, then that  
6 would mean that he only made two false  
7 statements about Juror Wright. The two false  
8 statements were that she knew Flowers' sister,  
9 Cora, and that she knew Flowers' sister,  
10 Sherita. So then there would be two.

11 But if I could go back for a moment to  
12 Ms. Burnside, when he repeated the story, I  
13 think the -- the pretext of this reason is  
14 apparent when we look at Ms. Burnside.  
15 Ms. Burnside worked for Ms. Tardy.  
16 Ms. Burnside worked for Ms. Tardy, caring for  
17 her mother. Ms. Burnside was helped during her  
18 divorce by Ms. Tardy.

19 So whatever she might have felt  
20 negative about the son-in-law, the feelings she  
21 would have had about the victim herself could  
22 only have been positive. And yet he cited this  
23 same reason.

24 When we look at that, what we see --

25 JUSTICE ALITO: Didn't Juror Burnside

1     also say repeatedly she didn't want to judge  
2     anybody?

3                 MS. JOHNSON:  No, she did not -- oh,  
4     Juror Burnside said --

5                 JUSTICE ALITO:  Yes.

6                 MS. JOHNSON:  -- that she did not want  
7     to judge anyone.  She did say that.  But I  
8     think --

9                 JUSTICE ALITO:  And you think that's  
10    not a legitimate reason for -- for striking a  
11    juror who's going to have to judge whether  
12    someone who's accused of a serious crime is  
13    guilty or not?

14                MS. JOHNSON:  That is a legitimate  
15    reason for striking a judge -- I'm sorry, for  
16    striking a juror.

17                (Laughter.)

18                MS. JOHNSON:  But the problem -- the  
19    problem isn't whether the reason is a  
20    legitimate reason but whether the reason was  
21    pretext.

22                And when we look at what he did with  
23    respect to citing the relationship having been  
24    sued by the Tardys, it looks like everything  
25    he's saying is pretext.

1           And if I could also go back to the  
2   rest of your question about Juror Wright. So  
3   there were three misrepresentations with  
4   respect to Juror Wright.

5           There was also -- they also cited the  
6   number of defense witnesses that she knew, but  
7   the prosecutor, Doug Evans, did not question  
8   prospective white jurors Waller, Lester,  
9   Blalock, and Fields about their relationships  
10   with witness -- with white -- with defense  
11   witnesses, nor did he strike them when he had  
12   an opportunity to do so.

13           JUSTICE ALITO: But isn't it true she  
14   also worked with the defendant's father?

15           MS. JOHNSON: She worked in the same  
16   location as the defendant's father, but --

17           JUSTICE ALITO: She worked in the same  
18   store, right?

19           MS. JOHNSON: She worked in the same  
20   store.

21           JUSTICE ALITO: At the world's  
22   smallest Walmart.

23           MS. JOHNSON: That's what the --

24           JUSTICE ALITO: That's what they said.

25           MS. JOHNSON: -- that's what the trial



1 court described it as. But -- but it is  
2 important to notice that when she was asked  
3 does he still work there, she didn't even know  
4 if he still worked there.

5 So there's really --

6 JUSTICE ALITO: Yeah, but did she  
7 still work there?

8 MS. JOHNSON: She did.

9 JUSTICE ALITO: I thought she had  
10 left?

11 MS. JOHNSON: No, that's another juror  
12 with respect to -- I believe with respect to  
13 Cora Flowers. But what I wanted to -- she  
14 didn't know if he still worked there, but --

15 JUSTICE SOTOMAYOR: Compare her with  
16 Pamela Chesteen. That comparison is the one  
17 that I'm most interested in.

18 MS. JOHNSON: I was about to do that.  
19 And so I think that it's true that working with  
20 someone under some circumstances might produce  
21 bias.

22 It is interesting that the only thing  
23 she said that might suggest the closeness of  
24 the relationship is that she didn't know  
25 whether he still worked, and the -- and Evans

1 did not ask about the closeness of the  
2 relationship.

3 Nor did he worry about the closeness  
4 of the relationship with Juror Chesteen and  
5 four or I think it's maybe even five of  
6 Flowers' family members. Juror Chesteen worked  
7 as a teller in a bank where all five of them  
8 came and she waited --

9 JUSTICE SOTOMAYOR: She said that she  
10 knew the father as well.

11 MS. JOHNSON: Yes, she knew the father  
12 and the mother and two sisters and a brother.  
13 And Doug Evans was not interested in pursuing  
14 --

15 JUSTICE GINSBURG: But isn't that  
16 relationship of a bank teller to someone who  
17 comes to make a deposit different from someone  
18 who is a coworker and it would encounter  
19 someone in the work setting on a daily basis?

20 MS. JOHNSON: It is a different  
21 relationship or it could be a very different  
22 relationship. We can't actually even know the  
23 closeness of either relationship unless there  
24 was inquiry.

25 But Doug Evans did not make that kind

1 of an inquiry. Indeed, what he said to Juror  
2 Chesteen is -- and that was a purely  
3 professional relationship. He didn't ask  
4 whether she had a close relationship, whether  
5 she was worried. He instead presumed,  
6 reassured, everyone that she did not.

7 CHIEF JUSTICE ROBERTS: All the -- all  
8 the -- the questions that we've been addressing  
9 here are the same sort of questions you would  
10 get in a typical Batson case, looking at the  
11 circumstances of the potential jurors that were  
12 struck in this case.

13 But, I mean, of course, as -- as my  
14 colleagues have recognized, the case is unusual  
15 because you have the extensive history. And I  
16 think that's probably why the case is here for  
17 -- for review.

18 And I'm interested, because,  
19 obviously, the rule we adopt will apply in  
20 other cases, how far your argument that we need  
21 to look at the past history is -- is pertinent.

22 If -- if the prosecutor had -- had one  
23 Batson violation in his 30-year career, 20  
24 years ago, is that something that should be  
25 brought out and pertinent in the assessment of

1 the current Batson challenges?

2 MS. JOHNSON: Mr. Chief Justice, may I  
3 say one thing about Carolyn Wright that I don't  
4 want to forget?

5 CHIEF JUSTICE ROBERTS: Sure.

6 MS. JOHNSON: The other thing that's  
7 noteworthy about her is that she put on her  
8 death penalty questionnaire that she was  
9 strongly in favor of the death penalty.

10 So, when we look at her as a whole, a  
11 -- a -- a prosecutor who was looking in a  
12 colorblind way would have been attracted to  
13 her.

14 CHIEF JUSTICE ROBERTS: Now for my  
15 question?

16 MS. JOHNSON: But now -- now for your  
17 question. And I apologize, but I was worried I  
18 would not get back to that.

19 So I think this is an extraordinary  
20 case. I have combed the cases and I cannot  
21 find any case --

22 CHIEF JUSTICE ROBERTS: No, no, I know  
23 it's -- you're -- you're fighting the  
24 hypothetical.

25 My question is 30 years, a Batson

1 violation 20 years ago, is that pertinent to  
2 the consideration in the current case?

3 MS. JOHNSON: I'm sorry, I didn't  
4 understand the question then. Yes, it is  
5 pertinent, but it's weakly probative.

6 So I think, when we conduct a  
7 consensitive inquiry, we look, as we would in a  
8 criminal case, we look at how recent a  
9 fabrication has been, whether it's on a  
10 relatively similar matter, whether the person  
11 has the same motive.

12 So a case that occurred 30 years ago  
13 would be very different in terms of motive. It  
14 also would be quite different in terms of the  
15 established law of this Court.

16 CHIEF JUSTICE ROBERTS: Well --

17 MS. JOHNSON: So someone who violates  
18 Batson before it's announced or someone who  
19 violates Batson immediately thereafter, that's  
20 less probative than someone who has done so  
21 repeatedly.

22 CHIEF JUSTICE ROBERTS: So -- so what  
23 is -- what is the rule you would have us adopt  
24 as a general rule, not just in a particular  
25 case as extreme as this one?

1 MS. JOHNSON: The general rule is a  
2 rule that you have already adopted, which is  
3 that, in Stage 3, every factor that bears upon  
4 credibility is relevant.

5 So that's the general rule. And I  
6 suppose if we say that in another way, the  
7 Mississippi Supreme Court asked only the  
8 question of is there a juror left -- is there a  
9 reason for this juror left standing that is not  
10 contradicted by the record and exactly matched  
11 by a white juror.

12 And that's not the right rule. The  
13 right rule is a sensitive inquiry.

14 JUSTICE KAVANAUGH: Even --

15 JUSTICE GORSUCH: Go ahead. Your  
16 turn.

17 JUSTICE KAVANAUGH: No, you go first.

18 (Laughter.)

19 JUSTICE GORSUCH: All right, all  
20 right.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Gorsuch.

23 JUSTICE GORSUCH: All right. I want  
24 to pursue the Chief Justice's question just a  
25 little bit further so I can understand what

1     you'd have us do in the next case.

2             Let's just suppose this case, trial 6,  
3     was perfect and the strikes were without taint  
4     otherwise, but we have this history with this  
5     prosecutor.

6             Would that be a problem still, or  
7     would there be no Batson violation in those  
8     circumstances?

9             MS. JOHNSON:  If there weren't eight  
10    misrepresentations of fact --

11            JUSTICE GORSUCH:  Right.

12            MS. JOHNSON:  -- disparate questioning  
13    --

14            JUSTICE GORSUCH:  Right, right.

15            MS. JOHNSON:  -- all that stuff --

16            JUSTICE GORSUCH:  Right.  You're  
17    fighting the hypothetical again.

18            MS. JOHNSON:  -- and there's only the  
19    history --

20            JUSTICE GORSUCH:  Yeah, yeah.  The  
21    hypothetical is let's suppose that this case,  
22    there were strikes, but they were explained by  
23    non-discriminatory reasons.  Yet we have --

24            MS. JOHNSON:  And there were no other  
25    --

1 JUSTICE GORSUCH: -- yet we have this  
2 prosecutor with this history. What then? How  
3 should the Court assess a case like that?

4 MS. JOHNSON: If there are no other  
5 indicia of discrimination, then the defendant  
6 has not met his burden of proof by proving  
7 prior discrimination.

8 JUSTICE GORSUCH: Okay. So we need  
9 discrimination in this trial in order to have a  
10 Batson violation?

11 MS. JOHNSON: Yes.

12 JUSTICE GORSUCH: Okay. All right.  
13 That's helpful. Thank you.

14 JUSTICE KAVANAUGH: My question was  
15 about the history. I thought that Swain had  
16 said that the history was relevant. In fact,  
17 Swain said history was the only way you could  
18 prove a violation. What Batson did was to say  
19 no, you can look even at the individual case.  
20 But Batson, as I read it, did not say you no  
21 longer take account of the history.

22 Your reading of Swain and how Swain  
23 and Batson interact?

24 MS. JOHNSON: I think that's entirely  
25 correct, Your Honor. Even in Swain, a history



1 was relevant. And to look more broadly, in  
2 Arlington Heights, this Court said that history  
3 is relevant. So -- and in Miller-El said that  
4 history was relevant.

5 So there isn't a new rule about  
6 history being relevant. The Mississippi  
7 Supreme Court ignored what this Court has  
8 already said about history being relevant. And  
9 --

10 JUSTICE GINSBURG: The court -- the  
11 court --

12 MS. JOHNSON: -- the broader point,  
13 that everything --

14 JUSTICE GINSBURG: -- the court said  
15 it took account of the history. So what are we  
16 to make of that?

17 MS. JOHNSON: Well, if there were --  
18 if the court had taken account of its -- of the  
19 history, it couldn't have come to this  
20 conclusion. And I think there's many reasons  
21 in the opinion to believe that they did not.

22 They said, considering the history, it  
23 doesn't alter our opinion, and they pasted in  
24 their prior opinion that was history blind.  
25 They also said his -- his history does not

1       undermine his stated reasons.

2               That's wrong. It undermines those  
3 reasons. It may or may not be sufficient, but  
4 a history of will -- of a desire for a -- an  
5 all-white jury, a history of willingness to  
6 violate the Constitution, and a history of  
7 willingness to make false statements to a trial  
8 court, those things in the past with respect to  
9 at least three other jurors, that does  
10 undermine it.

11              And then I think, when we look at what  
12 they actually did, there is no point in which  
13 they say: Yes, we are more skeptical of the  
14 reasons that he stated because he was dishonest  
15 before. Or, yes, when I look at -- at the  
16 false statements he made here, the eight false  
17 statements he made here, those match with false  
18 statements that he made before.

19              They never did that. So I think they  
20 did not consider his history, nor did they  
21 consider anything else that would be consistent  
22 with this Court's insistence that we look at  
23 the totality of the circumstances and conduct a  
24 sensitive inquiry into.

25              JUSTICE KAGAN: Ms. Johnson --

1 JUSTICE GINSBURG: You say your  
2 strongest case is Juror, potential juror,  
3 Wright. One of your complaints is that there  
4 were many more questions asked of African  
5 American potential jurors, but that wasn't so  
6 in Wright's case, that she was asked, I think,  
7 only three questions. Is that --

8 MS. JOHNSON: That's correct.

9 JUSTICE GINSBURG: Yes.

10 MS. JOHNSON: But I think, you know,  
11 it is -- actually, the relevance of the  
12 disparate questioning is not merely to ask how  
13 many questions this juror was asked. So it  
14 might indeed be as the Mississippi Supreme  
15 Court said that, with respect to some African  
16 American jurors, it was legitimate to ask them  
17 more questions because more of them knew  
18 Flowers' family.

19 But the -- the point still remains --  
20 and this is the point that this Court made in  
21 Miller-El -- disparate questioning of even  
22 another juror is relevant. It does suggest  
23 that the prosecutor is looking for reasons to  
24 strike an African American juror as opposed to  
25 being interested in bias or death penalty

1 attitudes or anything else.

2 JUSTICE KAGAN: Ms. Johnson, some time  
3 ago Justice Alito asked you about the  
4 prosecutor's investigation of certain potential  
5 jurors. And how many jurors did the prosecutor  
6 separately investigate and were --

7 MS. JOHNSON: Three.

8 JUSTICE KAGAN: And all African  
9 American?

10 MS. JOHNSON: All of them were African  
11 American. And when defense counsel said he's  
12 investigating African American jurors, there's  
13 no evidence that he investigated anyone else,  
14 he said nothing.

15 So he had an opportunity to say, oh,  
16 I've investigated everyone. And he did not say  
17 that.

18 JUSTICE KAGAN: And can I ask you  
19 about the disparate questioning? Because you  
20 referred to something which struck me when --  
21 as I read through all of this, this is unlike  
22 some Batson cases you see. It's a very small  
23 town where everybody knows everybody,  
24 apparently, or many people know many people.  
25 And it's a largely segregated town, where you

1     might think that African Americans knew more  
2     African Americans than they would whites or  
3     vice versa.

4                 So does that account for some of the  
5     differential questioning? In other words, just  
6     sort of looking at the environment and saying I  
7     have to push more on whether X knew Y because,  
8     given the circumstances of the town, X might  
9     very well have known Y?

10                MS. JOHNSON: The Mississippi Supreme  
11     Court said that it accounted for some of the  
12     differential questioning, and I think that's  
13     correct. There are more African American  
14     jurors who report relationships with defense  
15     witnesses or the defense family members.

16                But there are five -- five white  
17     jurors who report such relationships and whom  
18     the prosecutor did not ask questions about  
19     those relationships. So --

20                JUSTICE GINSBURG: Such -- when you  
21     say "such relationships," were they  
22     relationships because of working at the same  
23     place or living in the same neighborhood, in  
24     the case of the white jurors?

25                MS. JOHNSON: They were -- none of the

1 relationships were working at the same place.  
2 But when -- when he was asked -- when -- when  
3 they were asked in group voir dire about whom  
4 they knew, white jurors responded that they  
5 knew defense witnesses, and they were not  
6 questioned about those witnesses.

7 So we can't really know what the  
8 nature of those relationships are if we don't  
9 ask questions.

10 JUSTICE ALITO: Do you -- do you have  
11 those names or is -- is that in your brief  
12 someplace? I don't remember.

13 MS. JOHNSON: It is in the brief, but  
14 it is Waller, Lester, Blaylock, and Fields, as  
15 well as Chesteen.

16 JUSTICE SOTOMAYOR: I found it  
17 strange, but maybe you can -- or unusual, I  
18 should say, not strange, unusual that there  
19 were some white jurors who had people accused  
20 of crimes in jail, relatives accused of crimes  
21 in jails. Were there any questions about how  
22 that affected those white jurors?

23 MS. JOHNSON: No, there were no  
24 questions about that at all of three of them  
25 and I think a very brief question about -- for

1 two of them. And I think that goes to the  
2 question of, was he really investigating bias  
3 when he asked this question about being sued by  
4 Tardy Furniture?

5 If you're really investigating bias,  
6 you would be concerned about bias against your  
7 office. And he was not interested in that.

8 With the Court's permission, I will  
9 reserve the rest of my time for rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 ORAL ARGUMENT OF JASON DAVIS

13 ON BEHALF OF THE RESPONDENT

14 MR. DAVIS: Mr. Chief Justice, and may  
15 it please the Court:

16 The history in this case is troubling.  
17 But the history is confined to this case, and,  
18 as Mr. Chief Justice pointed out, it is  
19 unusual.

20 There are -- this is the sixth trial  
21 in this small town, a small town of  
22 approximately 5,000 individuals. The  
23 questioning of whether the makeup or the  
24 limited number of individuals in the town was  
25 one of the reasons for follow-up questions is

1 accurate.

2 At the outset, let me say that the  
3 Mississippi Supreme Court's decision in this  
4 case was commensurate with Batson and its  
5 progeny. And I would return to Justice  
6 Gorsuch's question of if we disengage this  
7 troubling history -- and I agree, I'm not  
8 suggesting that, as Justice Alito said;  
9 however, if we take that out of the case, we --  
10 we don't have any taints.

11 JUSTICE ALITO: Could I just ask --

12 MR. DAVIS: We can't be --

13 JUSTICE ALITO: -- a question of the  
14 Mississippi law? Could the attorney general  
15 have said, you know, enough already, we're  
16 going to send one of our own people to try this  
17 case, preferably in a different county, where  
18 so many people don't know so many other people?  
19 Could he have done that?

20 MR. DAVIS: Statutorily, the Attorney  
21 General's Office is allowed to assist, is  
22 allowed to take over, but only upon request by  
23 that district attorney. So that was not an  
24 option in this case. We were not so requested.

25 JUSTICE KAVANAUGH: You -- you said if



1 -- if we take the history out of the case. We  
2 can't take the history out of the case.

3 MR. DAVIS: No, Justice Kavanaugh.  
4 I'm not saying that's what I'm saying exactly  
5 happened --

6 JUSTICE KAVANAUGH: It was 42 -- 42  
7 potential African American Americans and 41 are  
8 stricken, right?

9 MR. DAVIS: Yes, Your Honor, that is  
10 correct.

11 JUSTICE KAVANAUGH: We have to --  
12 that's relevant, correct?

13 MR. DAVIS: That is relevant, yes,  
14 Your Honor. The -- as this Court has held in  
15 Miller-El, history is part of the  
16 consideration.

17 JUSTICE KAGAN: So you agree that it's  
18 not only the adjudicated Batson violations that  
19 are relevant but also the number of strikes  
20 such as Justice Kavanaugh listed?

21 MR. DAVIS: I do with qualification.  
22 There -- the strikes were unique. The strikes  
23 in this case are supported in the record.

24 Each of the jurors that were struck  
25 either worked with a relative, were related, or

1 knew, intimately, family members, the defendant  
2 or his family members, up to and including one  
3 juror who lied on her questionnaire and then  
4 admitted to lying on the stand.

5 JUSTICE GINSBURG: You have a very  
6 strange position on potential jurors who lied  
7 because there was the case of white juror,  
8 Huggins, who said he had no knowledge of the  
9 Flowers case when, in fact, he was on a 2007  
10 voir dire panel.

11 And you say: Oh, well, that doesn't  
12 matter that -- that he lied because he didn't  
13 admit to lying.

14 I think if someone lied and didn't  
15 admit to it, that would be a count against that  
16 person, rather than in that person's favor.

17 MR. DAVIS: And -- and the trial court  
18 in this case made the distinction that the  
19 juror who was struck for lying on her  
20 questionnaire admitted on the stand that she  
21 lied intentionally, which was not the case with  
22 Juror Huggins.

23 And it would seem, it appeared, that  
24 he -- his participation in the panel, and he  
25 was dismissed long before he got anywhere near

1 selection, that he either forgot that or it  
2 completely left his mind at the time he was  
3 initially questioned.

4 JUSTICE SOTOMAYOR: But let's go back  
5 to that. If we're looking at whether this is  
6 pretext, Mr. Evans was willing to give an  
7 excuse to this juror and keep him, despite the  
8 fact that there was direct evidence that he  
9 knew about the case. He was willing to accept  
10 the white lie, but not a truthful answer under  
11 oath in front of a judge.

12 Doesn't that suggest pretext to you?

13 MR. DAVIS: Again, Justice Sotomayor,  
14 the -- the issue as it reads from the record is  
15 that the juror who lied on her questionnaire  
16 expressly admitted that she lied for the sole  
17 purpose of getting off the jury.

18 JUSTICE SOTOMAYOR: Well --

19 MR. DAVIS: And -- and that doesn't --

20 JUSTICE SOTOMAYOR: -- I have to tell  
21 you, if that were the case, I -- I don't think  
22 one could take one juror and not push them on  
23 those questionnaires and come up to an  
24 intentional understatement or overstatement.

25 MR. DAVIS: Again, Your Honor, that

1 was -- and this is one of the issues with this  
2 case, is that each one of these strikes that we  
3 have, we don't have one single reason. We have  
4 numerous --

5 JUSTICE SOTOMAYOR: That --

6 JUSTICE BREYER: All right. Let --  
7 let's look at them. But you do have history.  
8 Trial 1: Five black juror possibles, uses  
9 peremptories, strikes all five.

10 Trial two: Five black jurors  
11 possible, uses all five, strikes all five  
12 blacks. Okay.

13 Trial number three: There were 17  
14 black possible. He uses only 15 this time.  
15 Why? Because he ran out of peremptories. He  
16 only had 15. All right.

17 Fourth trial: 16 black. He only  
18 struck 11. That's because he only had 11  
19 peremptories perhaps. All right?

20 Now we come to this trial with that  
21 background. Okay. And I don't think it's  
22 going to take much once you have that  
23 background.

24 So now let's look at one black juror,  
25 one white one, potential. Okay? Let's call

1     them 1 and 2. Both are women. Both are in  
2     their mid-40s. Both have some college  
3     education. Both strongly favor the death  
4     penalty.

5             Now the potential black actually has a  
6     brother serving as a prison guard. Now you  
7     would have thought that might have favored the  
8     prosecution in a prosecutor's mind. Okay. So  
9     that's one difference. I don't think that cuts  
10    in your favor.

11            Then have they ever had anybody  
12    arrested, you know? No, neither has. And do  
13    they know people in the case? Yeah. They each  
14    know something over 30 people, same, same,  
15    same, same.

16            Now is there a connection with the  
17    Flowers family? Well, the black juror did, in  
18    fact, possibly work at some distance, we don't  
19    know quite what, with the father at Walmart,  
20    and the white one knew his father, mother,  
21    sister, cousin, through her work as a bank  
22    teller.

23            And then we get the last thing, which  
24    the Mississippi Supreme Court thought was so  
25    crucial, is that the black potential juror was

1 sued for overdue credit and maybe she paid the  
2 garnishment of \$30. I don't know.

3 But the white juror had been a friend  
4 of the victim's daughter in high school. Okay?  
5 There we have it. Potential black, potential  
6 white. And we have the whole background.

7 Now, looking at that, you tell me,  
8 what was the difference as to why he could  
9 strike, if that background, Carolyn Wright, the  
10 potential African American juror who was Number  
11 4, and Pamela Chesterton, the potential white  
12 American juror who was Number 17.

13 What's the difference? What's the  
14 difference given all those similarities?

15 MR. DAVIS: Juror 14, Carolyn Wright,  
16 was struck because she was sued by Tardy.

17 JUSTICE BREYER: Yeah.

18 MR. DAVIS: Juror 14, Carolyn Wright,  
19 worked with the defendant's father, Archie, at  
20 Walmart.

21 JUSTICE BREYER: Yep.

22 MR. DAVIS: The distinction would be  
23 --

24 JUSTICE BREYER: Wait, wait. You  
25 didn't add that Juror Number 17 had been a

1 friend of the victim's daughter in high school  
2 and also knew Flowers' father, mother, sister,  
3 and a cousin through her work as a teller at  
4 the bank.

5 MR. DAVIS: Wright's relationship with  
6 the father was a work relationship, an  
7 employer/employee relationship. Chesteen was a  
8 bank teller, admitted that she just saw them  
9 coming in through the bank. So this was a --  
10 an employee and customer relationship, which  
11 the Mississippi Supreme Court made a  
12 distinction.

13 JUSTICE BREYER: In other words, it  
14 was closer, the first relationship?

15 MR. DAVIS: Well, the --

16 JUSTICE BREYER: And the record when I  
17 read that will bear out that the first one  
18 really was a closer relation than seeing them  
19 every week or whatever as a bank teller.

20 MR. DAVIS: Well, the record --

21 JUSTICE BREYER: Will -- will it say  
22 that? I don't think it will because I think  
23 they said, well, how closely physically did you  
24 work with the -- the father? And there was no  
25 answer to that question.

1           MR. DAVIS: The -- the record will  
2     bear out that the district attorney only struck  
3     those individuals that worked with members of  
4     his family. And that was consistent.

5           JUSTICE BREYER: Okay. So that's the  
6     reason. The distinction is when I go back in  
7     the record, I have to say, knowing Flowers'  
8     father, mother, sister, cousin through the work  
9     as a bank teller is not a good reason for  
10    striking somebody. But working with Flowers'  
11    father at some unknown distance at Walmart is.  
12    And that's the crucial difference I will find.

13           There is a difference there, but is  
14    there anything else? Because, after all, I  
15    have the history, plus -- plus now I've  
16    narrowed it down -- that's why I asked -- I've  
17    narrowed it down to that being the difference.

18           MR. DAVIS: Again, Justice Breyer, I  
19    would also say that one of the differing things  
20    was that she was sued by Tardy.

21           JUSTICE BREYER: Yes.

22           MR. DAVIS: Which was a theme with at  
23    least one other --

24           JUSTICE BREYER: Right. And so I also  
25    should look at that and then decide whether



1     that really is more significant than the fact  
2     that Number 17 was friends with the victim's  
3     daughter in high school.

4             You know, sometimes you're friends  
5     with your high school -- your high school pals  
6     you don't forget.

7             So -- so I -- so those are the two  
8     things I should look at. Is there anything  
9     else?

10            MR. DAVIS: I think that's enough,  
11     Your Honor.

12            JUSTICE KAGAN: I mean, in many --

13            JUSTICE BREYER: Well, I do too.

14            (Laughter.)

15            JUSTICE ALITO: Is there any --

16            JUSTICE KAGAN: -- in many respects,  
17     Mr. Davis, Ms. Wright is a -- is a perfect  
18     juror for a prosecutor. Right? She is -- she  
19     strongly favors the death penalty. Her uncle  
20     is a prison security guard. Her relative is  
21     the victim of a violent crime.

22            Except for her race, you would think  
23     that this is a juror that a prosecutor would  
24     love when she walks in the door. Isn't she?

25            MR. DAVIS: Not if she works with the

1 defendant's family and not if she was sued by  
2 the workplace of one of the victims. And --  
3 and that's the distinguishing factor here.

4 JUSTICE GORSUCH: Counsel --

5 JUSTICE BREYER: I don't want to  
6 imply, I'm sorry, that you have directed me to  
7 the two relevant parts of the record, and  
8 before I make up my mind definitely, I will  
9 read those two relevant parts, both sides.  
10 Okay?

11 CHIEF JUSTICE ROBERTS: Again,  
12 counsel, again, we're sort of conducting this  
13 as if it were one -- one case. And in terms of  
14 a broader rule, do you -- do you recognize or  
15 do we recognize in our precedent any  
16 restriction on the prior history that can be  
17 brought up with respect to a current -- current  
18 case?

19 MR. DAVIS: No, Your Honor. And --  
20 and far be it from me to presume the full basis  
21 for the grant, but I certainly see that as one  
22 of the issues before the Court, is, as Your  
23 Honor asked, how far are we to go? And -- and  
24 -- and what does it matter? What -- what part  
25 does that history play?

1 CHIEF JUSTICE ROBERTS: But my point  
2 is do you -- is there anything in our precedent  
3 that suggests that there ought to be a  
4 limitation on looking to the history of the  
5 prosecutor involved?

6 MR. DAVIS: There's no limitation on  
7 the history. I think certainly the precedent  
8 says that you have to consider it. I'm not  
9 aware of any language in Batson and its progeny  
10 for this particular circumstance where we have  
11 six trials by the same district attorney. I'm  
12 not aware of any. This is a unique situation  
13 in that regard.

14 JUSTICE GORSUCH: And -- and along  
15 those lines, Justice Breyer has pointed out a  
16 dichotomy that in other circumstances might be  
17 explicable by an innocent reason.

18 But, if all of the history is  
19 relevant, as you've acknowledged, how -- does  
20 that -- what light does that shed on what  
21 otherwise might appear to be an innocent  
22 strike?

23 And when -- when should -- what rule  
24 would you lay down -- I know that's hard to do,  
25 but we're presumably taking cases to guide

1 future disputes, not just to resolve this one.

2 How -- how would you -- how would you  
3 write that rule as to the relevance of the past  
4 information with -- when we're looking at the  
5 current trial?

6 MR. DAVIS: In responding to that,  
7 Your Honor, let me say that when we use the  
8 word "history," we are limiting it to this  
9 case, this district attorney and his over 25  
10 years of experience, having searched for  
11 additional cases and no cases cited by the  
12 Petitioner, outside of this case in regards to  
13 a Batson violation.

14 So the history is limited here. The  
15 question then is what to do in a case like  
16 this. How much does the specter of those two  
17 prior violations come into play in the -- in  
18 the analysis in this?

19 I think it certainly has to be looked  
20 at. I believe the trial judge --

21 JUSTICE SOTOMAYOR: Is it just the  
22 specter of the two violations? Weren't there  
23 two cases that were overturned or -- in which  
24 prosecutorial misconduct -- at least the first  
25 was overturned on prosecutorial misconduct.

1 They didn't even reach the Batson challenge.

2 MR. DAVIS: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: But doesn't that  
4 tell you something about this man's passion for  
5 this case? I -- I don't even need to call it  
6 anything else, but doesn't that tell you how  
7 you should be looking at this case?

8 MR. DAVIS: I -- I can't speak to his  
9 passion for the case, Your Honor. I can speak  
10 to his pursuit of conviction in this in the  
11 sense of the six trials, which -- in which  
12 there -- there were --

13 JUSTICE SOTOMAYOR: But he didn't -- I  
14 understand he didn't ask the attorney general  
15 to step in, which he could have, to prosecute  
16 the case. But I understand he lobbied two  
17 legislators to try to change the venue,  
18 legislatively. Is that correct?

19 MR. DAVIS: That's my understanding,  
20 Your Honor.

21 JUSTICE SOTOMAYOR: So he could try  
22 the case?

23 MR. DAVIS: Well, try the case outside  
24 of Montgomery County.

25 JUSTICE SOTOMAYOR: Instead of getting

1 the attorney general to try the case?

2 MR. DAVIS: And -- and I would again  
3 reiterate --

4 JUSTICE SOTOMAYOR: In his own county?

5 MR. DAVIS: Yes, Your Honor. And --  
6 and we are strictly prohibited from inter --  
7 interjecting ourselves in cases we tried, not  
8 in this case, but in another case, and our  
9 supreme court --

10 JUSTICE KAVANAUGH: In Batson --

11 MR. DAVIS: -- said you can't do that.

12 JUSTICE KAVANAUGH: Sorry, in Batson,  
13 we held that a prosecutor cannot state merely  
14 that he challenged jurors in the defendant's  
15 case -- of the defendant's race on the  
16 assumption or his intuitive judgment that they  
17 would be partial to the defendant because of  
18 their shared race.

19 That was really the critical sentence  
20 in Batson, and the dissent disagreed with that.  
21 The critical change. You can't just assume  
22 that someone's going to be favorable to someone  
23 because they share the same race.

24 And when you look at the 41 out of 42,  
25 how do you look at that and not come away with

1     thinking what was going on there was what the  
2     dissent in Batson said was permissible, that  
3     the majority said was not permissible, that  
4     there's a stereotype that you're just going to  
5     favor someone because they're the same race as  
6     the defendant?

7             MR. DAVIS:  I respectfully, in this  
8     case, in no way agree that there was some prior  
9     determination made by the district attorney  
10    that -- that because of this person's race,  
11    they were not going to be favorable.

12            Again, this case has spanned some 23  
13    years now in this small community.  One of the  
14    inherent problems of --

15            JUSTICE KAGAN:  But I -- I guess I  
16    don't understand how you can say this.  In this  
17    case, there were three adjudicated Batson  
18    violations.

19            MR. DAVIS:  Two.

20            JUSTICE KAGAN:  Okay, two.

21            (Laughter.)

22            MR. DAVIS:  Two.  The -- Flowers III  
23    and Flowers II both had adjudicated Batson  
24    issues.  That the trial court was aware of that  
25    was evident.  The same trial judge presided

1 over the fifth trial. And in this case, we had  
2 the same defense counsel. Counsel moved in  
3 motions that were offered in the fifth trial up  
4 to and including, in Joint Appendix 42, Motion  
5 Number 57, which was a motion to bar  
6 prosecution from exercising peremptory strikes  
7 at all or at least from exercising them against  
8 non-white minority members.

9 Judge Loper adopted his prior rulings.  
10 His ruling on that motion also included  
11 caution, caution to both parties that if  
12 there's any objections or challenges based on  
13 demeanor or based on a juror's appearance, that  
14 if it wasn't in the record, he was not going to  
15 consider it.

16 JUSTICE ALITO: Did we have some --

17 JUSTICE SOTOMAYOR: I'm sorry,  
18 counsel, did you just --

19 JUSTICE ALITO: -- didn't we say of  
20 this -- go ahead.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Did you just say  
24 that the same judge who tried the fifth trial  
25 also tried the sixth -- the sixth trial?



1 MR. DAVIS: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: And wasn't he the  
3 judge that ordered Mr. Evans to prosecute the  
4 sole holdout juror in the fifth trial?

5 MR. DAVIS: There --

6 JUSTICE SOTOMAYOR: And didn't  
7 Mr. Evans do that?

8 MR. DAVIS: There --

9 JUSTICE SOTOMAYOR: And the attorney  
10 general take over the case and say there was no  
11 basis for that prosecution?

12 MR. DAVIS: There were two jurors that  
13 were bound over to the grand jury on the basis  
14 of perjury. One pleaded guilty to that, and  
15 the other was nolle-prossed. Again -- and that  
16 was handled by the Attorney General's Office,  
17 not my division, but another.

18 JUSTICE SOTOMAYOR: But I think the  
19 attorney general nolle-prossed it because there  
20 was no basis for that prosecution.

21 MR. DAVIS: I don't know that there  
22 was not a basis. I just know that it was  
23 nolle-prossed.

24 JUSTICE KAGAN: May -- may I ask you  
25 about --

1 JUSTICE ALITO: Well, could we say in  
2 -- in this case because of the unusual and  
3 really disturbing history, this case just could  
4 not have been tried this sixth time by the same  
5 prosecutor? That he -- that he just cannot --  
6 in light of the history, you just can't  
7 untangle what happened before from the  
8 particular strikes in this case?

9 MR. DAVIS: But, again, Your Honor,  
10 you know, hindsight is 20/20. I -- I was not  
11 involved in any consideration on that. Had I  
12 been, it -- it might have been a suggestion of  
13 mine that that be the case, but that wasn't.

14 And -- however, the record in this  
15 case by no means supports the conclusion that  
16 the Mississippi Supreme Court's decision ran  
17 afoul of Batson or its progeny.

18 And -- and if I may, I'd like to  
19 return to what I was saying about the trial  
20 judge's being aware of the history.  
21 Specifically, Judge Loper said, at -- the  
22 transcript at page 314, "I know what Flowers  
23 III said." He then cautioned the state: "I'm  
24 going to look very closely at this case."  
25 Again, the judge acknowledging that he would be

1 diligent in making sure the same type of error  
2 did not occur again.

3 JUSTICE KAGAN: But what -- well, how  
4 closely did he look? I mean, let's talk --  
5 talk just about the questioning in this case.

6 The numbers themselves are staggering,  
7 the number of questions that were asked to  
8 African Americans versus whites. But more than  
9 the numbers, if you look at the -- the way --  
10 what these questions were targeted to do, let's  
11 take, for example, the questions on the death  
12 penalty. This prosecutor would question a  
13 white person who said that he or she had  
14 reservations about the death penalty. And the  
15 questions are all designed to rehabilitate the  
16 person. You know, the prosecutor would say:  
17 Well, if the law required you to do it, you  
18 could follow the law, couldn't you? And then  
19 the person would say yes.

20 But if an African American said that  
21 -- that he or she had qualms about the death  
22 penalty, the prosecutor would say the exact  
23 opposite. The prosecutor would say something  
24 like, well, it would be really hard for you to  
25 apply the death penalty then, wouldn't it?

1           So, in every case, this kind of  
2   disparate questioning, you know, it -- it looks  
3   as though he's -- he's designing, he's trying  
4   to create a record for striking black jurors  
5   that -- and -- and -- and for distinguishing  
6   black jurors from white jurors by means of his  
7   questioning, which is sort of, you know,  
8   completely opposite from the questioning that  
9   he gives to whites.

10           MR. DAVIS: I think the questions that  
11   the district attorney asked were a direct  
12   result of those responses these particular  
13   jurors provided in general voir dire. And --

14           JUSTICE KAGAN: Well, I think what I'm  
15   saying is it's not two jurors, one white, one  
16   black, says I have reservations about the death  
17   penalty, and he says to the white one: But you  
18   could follow the law. And he says to the black  
19   one: Well, I don't know, I guess you can't  
20   follow the law.

21           MR. DAVIS: Respectfully, Your Honor,  
22   that's not the case as I read the record. The  
23   -- each juror that indicated they were against  
24   the death penalty is certainly one that, in a  
25   general context, that a prosecutor would not

1 want to be on the jury.

2 And, of course, we had in this case  
3 vacillation amongst these jurors, for example,  
4 Flancie Jones, who on her juror questionnaire  
5 said she was strongly against the death penalty  
6 and then, during questioning, said she could  
7 consider it, but then went on to admit that she  
8 lied on her juror questionnaire.

9 So the questions that the district  
10 attorney asked were to follow up on what was on  
11 the juror questionnaire with regard to their  
12 statements therein regarding the death penalty.

13 In this case the record itself shows  
14 that the district attorney offered valid  
15 race-neutral reasons for each strike.

16 Each strike was considered by the  
17 trial court who had made aware -- made the  
18 parties aware of -- that he was aware of the  
19 history of the case, and the record supports  
20 that all the jurors that were struck were  
21 struck because they were either sued by Tardy  
22 Furniture, they were either related to the  
23 defendant, or friends with, or had worked with  
24 members of the defendant's family.

25 And these are all valid race-neutral

1 reasons.

2 JUSTICE GINSBURG: But there were no  
3 questions of white jurors who said they had a  
4 relationship with defense witnesses. There  
5 were no follow-up questions for them. They  
6 just said yes, they knew defense witnesses.

7 MR. DAVIS: The only -- to my  
8 recollection, Justice Ginsburg, is Pamela  
9 Chesteen, who indicated that she knew Flowers'  
10 family but only because she was a bank teller  
11 and she had seen them come in. Again, that was  
12 a general question.

13 JUSTICE GINSBURG: We didn't -- we  
14 don't know what the relationship of the others  
15 were because they weren't asked. They said  
16 they had a relationship with defense witnesses,  
17 but they weren't asked what is the  
18 relationship.

19 MR. DAVIS: I -- I'm sorry, I  
20 misunderstood. Regarding the ones that said  
21 they knew these witnesses in the case, Your  
22 Honor, yes.

23 And the Mississippi Supreme Court  
24 noted that, that they were. And, again, this  
25 is part and parcel of the issue with this

1     unique case is that, you know, 5,000 people in  
2     a town, everybody knows everybody. And  
3     everybody knew everything about the case.

4             And the Mississippi Supreme Court  
5     noted that these witnesses on both sides knew  
6     numerous witnesses for both the prosecution and  
7     the defense. And that is, of course, but one  
8     part of the analysis.

9             You have to look at the reasons that  
10    the -- that were offered by the district  
11    attorney. And in this case they all support  
12    the strikes that were --

13            JUSTICE KAVANAUGH: Well, the -- part  
14    of Batson was about confidence of the community  
15    and the fairness of the criminal justice  
16    system, right?

17            MR. DAVIS: Yes, Your Honor.

18            JUSTICE KAVANAUGH: And that was  
19    against a backdrop of a lot of decades of  
20    all-white juries convicting black defendants.  
21    Swain said let's put a stop to that but really  
22    didn't give the tools for eradicating  
23    discrimination. So you had another 21 years of  
24    that until Batson.

25            And then Batson said: We're going to

1     give you the tools to eradicate that, so that  
2     -- not just for the fairness to the defendant  
3     and to the juror, but that the community has  
4     confidence in the fairness of the system.

5             And can you say, as you sit here  
6     today, confidently you have confidence in the  
7     -- how this all transpired in this case?

8             MR. DAVIS: I have confidence in this  
9     record, Justice Kavanaugh. I have confidence  
10    in the strikes that this district attorney made  
11    based on the four corners of this record.

12            I have confidence that, if reviewed  
13    with an eye towards what actually transpired,  
14    it supports the Mississippi Supreme Court's  
15    decision in this case. That I have confidence  
16    in.

17            JUSTICE KAVANAUGH: Thank you.

18            JUSTICE SOTOMAYOR: Do you have  
19    confidence in how this case was prosecuted?

20            MR. DAVIS: Based on this record, yes,  
21    Your Honor, I do.

22            JUSTICE SOTOMAYOR: You know, I -- one  
23    of the first things I did when I found this  
24    case was to try to do some research because at  
25    least my former state prosecutor's office would



1 have substituted attorneys long before the  
2 fifth, sixth trial.

3 Regrettably, I don't -- I wasn't able  
4 to find any formalized guidance on that. But  
5 it does seem odd to me that any prosecutor  
6 would continue to try a case with this history.

7 MR. DAVIS: And, again, I would agree  
8 completely, Justice Sotomayor, that we have an  
9 unusual circumstance, an unusual case with  
10 these six trials having been all tried by the  
11 same prosecutor.

12 But I would resubmit, again, that the  
13 decision of the Mississippi Supreme Court in  
14 this instance was not violative of Batson and  
15 its progeny.

16 Thank you, Mr. Chief Justice.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel. You have four minutes remaining, Ms.  
19 Johnson.

20 REBUTTAL ARGUMENT OF SHERI LYNN

21 JOHNSON ON BEHALF OF THE PETITIONER

22 MS. JOHNSON: Unless this Court has  
23 further questions, I will waive rebuttal.

24 JUSTICE THOMAS: Ms. Johnson, did you  
25 -- would you be kind enough to tell me whether

1 or not you exercised any peremptories?

2 MS. JOHNSON: I was not the trial  
3 lawyer.

4 JUSTICE THOMAS: Well, did your --  
5 were any peremptories exercised by the  
6 defendant?

7 MS. JOHNSON: They were.

8 JUSTICE THOMAS: And what was the race  
9 of the jurors struck there?

10 MS. JOHNSON: She only exercised  
11 peremptories against white jurors.

12 But I would add that the motive -- her  
13 motivation is not the question here. The  
14 question is the motivation of Doug Evans.

15 JUSTICE SOTOMAYOR: She didn't have  
16 any black jurors to exercise peremptories  
17 against -- except the first one?

18 MS. JOHNSON: Except the first one.

19 JUSTICE SOTOMAYOR: But so did the  
20 prosecutor, except that one?

21 MS. JOHNSON: Correct.

22 JUSTICE SOTOMAYOR: After that, every  
23 black juror that was available on the panel was  
24 struck?

25 MS. JOHNSON: Yes.

1 JUSTICE SOTOMAYOR: Fine.

2 MS. JOHNSON: He struck one -- he  
3 seated one African American juror, and at the  
4 very end struck one white juror.

5 When all of the evidence in this case  
6 is considered, just as in Foster versus  
7 Chapman, the conclusion that race was a  
8 substantial part of Evans' motivation is  
9 inescapable, and the Mississippi Supreme  
10 Court's conclusion to the contrary is clearly  
11 erroneous. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel. The case is submitted.

14 (Whereupon, at 11:09 a.m., the case  
15 was submitted.)

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